

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of Humana Insurance Company,)	
Humana Inc., HumanaDental Insurance)	
Company, Humana Health Plan, Inc.,)	
CompBenefits Insurance Company,)	CG Docket No. 02-278
CompBenefits Dental, Inc., American)	
Dental Plan of North Carolina, Inc., The Dental)	CG Docket No. 05-338
Concern, LTD and Golden West Dental and Vision)	
Petition for Retroactive Waiver of 47 C.F.R.)	
§ 64.1200(a)(4)(iv))	

**HUMANA’S OPPOSITION TO APPLICATION FOR REVIEW FILED BY TCPA
PLAINTIFFS INCLUDING LAWRENCE S. BRODSKY**

Opposition Respondents, Humana Insurance Company, Humana Inc., HumanaDental Insurance Company (“HDIC”), Humana Health Plan, Inc., CompBenefits Insurance Company, CompBenefits Dental, Inc., American Dental Plan of North Carolina, Inc., The Dental Concern, LTD, and Golden West Dental and Vision (“Respondents” or “Petitioners”), submit this Opposition to the Application for Review filed December 2, 2016 (the “Application” or “Brodsky Application”) by several TCPA Plaintiffs, including Lawrence S. Brodsky, which seeks to vacate the Commission’s November 2, 2016 Order in CG Docket Nos. 02-278, 05-338 (the “*November 2 Order*”) which granted Petitioner’s petition for retroactive waiver pursuant to Section 1.3 of the Commission’s rules, 47 C.F.R. § 1.3, and paragraph 30 of the Commission’s October 30, 2014 Order¹ in CG Docket Nos. 02-278, 05-338 (the “*October 30 Order*”).

I. Introduction

Commenter Lawrence S. Brodsky (“Brodsky”), who sued HDIC in the United States

¹ *Petition for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission’s Opt-Out Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, 29 FCC Rcd 13998 (2014) (“*October 30 Order*”).

District Court for the Northern District of Illinois alleging faxes were sent to him by one of the petitioners (HDIC) violated the TCPA because they did not include the required opt-out notice, filed his Application for Review of the Commission's *November 2 Order* on December 2, 2016. Brodsky asserts two arguments in his Application related to Petitioners: (1) the Commission has no authority to "waive" violations of the regulations prescribed under the TCPA in a private right of action and that the "industry" shows that "regulated parties" understood the 2006 regulations implementing the opt-out notices on faxes sent with permission; and (2) the Humana Petition was not timely filed.² Brodsky's Application, p. 2. Brodsky's arguments are meritless. In the *November 2 Order*, the Commission correctly granted Petitioners' requested retroactive waiver of Section 64.1200(a)(4)(iv) of the Commission's rules. Brodsky's arguments in the Application that the *November 2 Order* should be vacated are largely a rehash of those offered in opposition to Humana's Petition and should be rejected for all of the reasons presented in the Petition, the Reply in support thereof, and the *November 2 Order*.

II. Argument

(1) Brodsky is wrong – the Commission has authority to grant retroactive waivers in a private right of action.

Brodsky argues, without support, that the Commission does not have authority to "waive" liability in a private right of action pending in a court of law and that "the contemporaneous evidence shows the 'industry' immediately understood opt-out notice was required on faxes sent with prior express permission, and there is no evidence to support a 'presumption of confusion.'" Brodsky's Application, pp. 6, 7. Brodsky is wrong in both respects.

The Commission can issue the retroactive waivers covering private rights of action. The

² Brodsky also argued a different petitioner, Buccaneers Limited Partnership, also should not have received a retroactive waiver because it also did not timely request a retroactive waiver. Humana will not be addressing the argument directed at Buccaneer Limited Partnership, which is represented by separate counsel.

Commission has found repeatedly in the three years since issuing its first waiver in the *October 30 Order* that it has the authority to grant retroactive waivers.

[W]e dismiss arguments that by granting waivers while litigation is pending violates the separation of powers as several commenter have suggested. As the Commission has previously noted, by addressing requests for declaratory ruling and/or waiver, we are interpreting a statute, the TCPA, over which Congress provided the Commission authority as the expert agency. Likewise, the mere fact that the TCPA allows for private rights of action to enforce rule violations, does not undercut our authority, as the expert agency, to define the scope of when and how our rules apply.

August 28 Order, ¶13³; see also *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, GC Docket Nos. 02-278, 05-338 para. 12 (CGAB Dec. 9, 2015) (“*December 9 Order*”) (repeating the explanation quoted above as well as quoted language from the *October 30 Order* establishing that it has the authority to grant retroactive waivers.) The Commissions’ *November 2 Order* repeated the same explanation and quoted the same language when it rejected the same arguments by Brodsky.⁴

Brodsky provides no support for his argument that “the industry” understood the opt-out notice was required on faxes sent with prior express permission. Regardless, the Commission addressed this issue in its *November 2 Order* and rejected it:

[W]e reject arguments that the Commission made actual, specific claims of confusion a requirement to obtain a waiver. The Commission did not require petitioners to plead specific, detained grounds for individual confusion, and we do not impose such a requirement now. The petitioners asserted their general confusion regarding the opt-out notice requirement for solicited faxes, and there is no evidence in the record demonstrating that petitioners understood they were required to comply by failed to do so.

November 2 Order, ¶17. Moreover, Brodsky never raised this issue in opposition to Humana’s

³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, et al.*, CG Docket 02-278, 05-338, Order, DA 15-976, 30 FCC Rcd 8598 para. 11 (2015) (“*August 28 Order*”).

⁴ The Commission supported its decision with citation to *Northeast Cellular v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) (“The FCC has authority to waive its rules if there is ‘good cause’ 47 CFR § 1.3. The FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.”).

Petition, so it must be rejected for this additional reason.

Brodsky's arguments that the Commission cannot grant retroactive waivers and that waivers were not warranted fail and the Commission should reject Brodsky's Application in its entirety.

(2) Brodsky is wrong – the Humana Petition was not untimely

Brodsky's arguments that Humana's Petition was untimely are a rehash of the arguments the Commission has already rejected – on multiple occasions – and should similarly reject them here.

Brodsky argues the Petition should have been rejected because Petitioners did not file their request by April 30, 2015, and because Petitioners did not explain why it was not filed before that date.⁵ Brodsky Application, p. 7. Brodsky engages in extended speculation and conjecture about what Petitioners knew and when they knew it (Brodsky Application, pp. 6-7), all of which is irrelevant. The Commission never described the April 30, 2015 date as a "deadline" beyond which waiver requests would be barred. Nor was Brodsky prejudiced by the fact that Petitioners filed their waiver request on December 18, 2015, as opposed to April 30, 2015, an issue Petitioners raised and Brodsky ignored.

As Brodsky knows and acknowledges, the Commission refuses to deny petitions filed after April 30, 2015.⁶ The Commission, in its *October 30 Order*, rejected the timing argument Brodsky continues to make, making the point that what matters is not the timing of a waiver request but whether a petitioner is similarly situated to the petitioners granted waivers in the *October 30 Order*. See *August 28 Order*, ¶20; and *December 9 Order*, ¶18 ("Finally, we decline to reject petitions

⁵ The Petition was filed on December 18, 2015.

⁶ Brodsky also admits that the Commission has ruled that there is no "deadline" for waiver requests and that the Commission merely "requested" that petitioners seek waivers by April 30, 2015. Brodsky Application, p. 7.

solely on the basis that they were filed after April 30, 2015. We observe that all of the petitions resolved by this Order were filed after the six-month date (April 30, 2015) referenced in the *2014 Anda Commission Order*.”). There is no dispute that the faxes for which Petitioners received the retroactive waiver were sent before April 30, 2015, and that the Petitioners are similarly situated to the initial waiver recipients. *November 2 Order*, ¶18.

The Commission properly concluded Humana’s Petition was timely and granted the request for retroactive waiver. That waiver was in keeping with “the purposes or intent of the initial waiver order because [Petitioners] are similarly situated to the initial waiver recipients.” *November 2 Order*, ¶18. Put simply, Brodsky has offered no compelling reasons to warrant the overturning of the Commission’s *November 2 Order*. Consequently, the Commission should reject Brodsky’s Application in its entirety.

III. Conclusion

Nothing in the Brodsky Application supports vacating the *November 2 Order*. Critically, the Commission found in the *November 2 Order* that the Petitioners “are similarly situated to the parties granted relief by the Commission in the *2014 Anda Commission Order*” and therefore were eligible for the waiver awarded. *November 2 Order*, ¶11. For the reasons stated herein, in their Petition filed on December 18, 2015, Reply in support thereof filed on February 19, 2016, and in the *November 2 Order*, Humana Insurance Company, Humana Inc., HumanaDental Insurance Company, Humana Health Plan, Inc., CompBenefits Insurance Company, CompBenefits Dental, Inc., American Dental Plan of North Carolina, Inc., The Dental Concern, LTD, and Golden West Dental and Vision, respectfully request that the Federal Communications Commission reject Brodsky’s Application for Review and uphold its order of November 2, 2016, in its entirety.

December 19, 2016

Respectfully submitted,

**HUMANA INSURANCE COMPANY,
HUMANA INC., HUMANADENTAL
INSURANCE COMPANY, HUMANA
HEALTH PLAN, INC., COMPBENEFITS
INSURANCE COMPANY, COMPBENEFITS
DENTAL, INC., AMERICAN DENTAL PLAN
OF NORTH CAROLINA, INC., THE DENTAL
CONCERN, LTD AND GOLDEN WEST
DENTAL AND VISION**

By: /s/ Joseph R. Jeffery
One of Their Attorneys

William A. Chittenden, III
David J. Novotny
Joseph R. Jeffery
Vittorio F. Terrizzi
CHITTENDEN, MURDAY & NOVOTNY LLC
303 W. Madison Street
Suite 1400
Chicago, Illinois 60606
Phone: (312) 281-3600
Fax: (312) 281-3678